

**Appellate Tribunal for Electricity**  
**(Appellate Jurisdiction)**

**APPEAL No.184 of 2011**

**Dated:27<sup>th</sup> Feb, 2013**

**Present: HON'BLE MR. JUSTICE M KARPAGA VINAYAGAM,  
CHAIRPERSON  
HON'BLE MR. RAKESH NATH, TECHNICAL MEMBER**

**In the Matter of:**

**Delhi Transco Limited,  
Shakti Sadan, Kotla Road,  
New Delhi-110 002**

**...Appellant**

**Versus**

- 1. Delhi Electricity Regulatory Commission  
Viniyamak Bhawan, 'C' Block,  
Shivalik,  
Malviya Nagar,  
New Delhi-110 017**
- 2. BSES Rajdhani Power Limited  
BSES Bhawan, Nehru Place,  
New Delhi-110 019**
- 3. BSES Yamuna Power Limited  
Shakti Kiran Building,  
Karkardooma, Delhi-110092,**
- 4. North Delhi Power Limited  
Grid Sub Station Building,  
Hudson Lines, Kingsway Camp,  
Delhi-110 009**
- 5. New Delhi Municipal Council  
Town Hall, Parliament Street,  
New Delhi-110 001**

**6. Military Engineers Services,  
Ministry of Defence,  
Government of India,  
New Delhi-110 001**

**...Respondent(s)**

Counsel for the Appellant(s) : Mr. M G Ramachandran  
Mr. Anand K Ganesan  
Ms. Swapna Seshadri  
Ms. Swagatika Sahoo

Counsel for the Respondent(s): Mr. R K Mehta  
Mr. David  
Mr. Antaryami Upadhyay for R-1  
Mr. Amit Kapur  
Mr. Vishal Anand  
Ms. Suganda Somani for R-2 & 3  
Ms. Anusha Nagarajan  
Mr. Anand K Srivastava  
Mr.Sakya Singha Chaudhuri for R-4

**J U D G M E N T**

**PER HON'BLE MR. JUSTICE M. KARPAGA VINAYAGAM,  
CHAIRPERSON**

1. Delhi Transco Limited is the Appellant herein. The Appellant is the Transmission Licensee for the National Capital Territory of Delhi. The Appellant also discharges the statutory functions of a State Transmission Utility and State Load Despatch Centre for the National Capital Territory of Delhi.

2. Prior to 1.4.2007, the Appellant was vested with the functions of the Bulk Power Purchase and supply of electricity to the Distribution Licensee in the National Capital Territory of Delhi.
3. The State Commission for the period from 1.4.2011 to 31.3.2012, decided to extend the principles of Multi Year Tariff Regulations, 2007 since it had not framed separate Regulations.
4. Pursuant to the above decision by the State Commission, the Appellant filed a Petition for approval of its Revenue Requirements and Determination of Tariff for the tariff period from 1.4.2011 to 31.3.2012.
5. The State Commission by the impugned order dated 26.8.2011 has approved the Revenue Requirements and determined the tariff of the Appellant for the said period. The State Commission, though decided to implement the decision of this Tribunal in Appeal No.133 of 2007 on various issues, did not incline to follow the decision of this Tribunal and disallowed the claim in respect of the prayer for adjustments of the past arrears by observing that the State Commission has already filed the Appeal against the said judgment before Hon'ble Supreme Court on this point and the same is pending.

6. In addition, the State Commission has not allowed various costs and expenses of the Appellant and adjusted a surplus of Rs.196.17 Crores for the year 2006-07 despite the fact that the above amount was declared as non existent as per the decision of this Tribunal in Appeal No.30 of 2010 dated 31.5.2010.
7. Aggrieved by this order, the Appellant has filed this Appeal.
8. The following issues have been raised by the Appellant in this Appeal:
  - (a) Non implementation of the judgment of this Tribunal in Appeals Nos.133 of 2007 and 28 of 2008;
  - (b) Assuming a sum of Rs.196.17 Crores as surplus to the Appellant contrary to the decision of this Tribunal;
  - (c) Escalation for the Multi Year period based on actual data;
  - (d) Non allowance of late payment surcharge;
  - (e) Rebate on payment allowed for the period 2007-08 to 2010-11;
  - (f) Employees Cost on the implementation of 6<sup>th</sup> Pay Commission's recommendations.

9. On these issues, the learned Counsel for the Appellant as well as the learned Counsel for the Respondent including the State Commission has argued the matter in detail.
10. Let us now deal with each of these issues one by one.
11. The **First Issue** is Non Implementation of the orders passed by this Tribunal in Appeal Nos. 133 of 2007 and 28 of 2008.
12. According to the Appellant, as against the order of the State Commission dated 22.09.2006, the Appellant had filed the Appeal No.133 of 2007 and this Tribunal through its judgment dated 13.01.2009, allowed the Appeal by holding that the past arrears relating to the DVB (Delhi Vidyut Board) period cannot be accounted in the revenue requirements of the Appellant and despite that, the State Commission in the impugned order refused to implement the decision rendered by this Tribunal on this point.
13. The Appellant further contended that similar decision has been taken by this Tribunal in favour of the Appellant in Appeal No.28 of 2008 through its judgment dated 29.9.2010 but, again the State Commission did not incline to implement the same.
14. According to the Appellant, in view of the decision of this Tribunal, the State Commission ought to have allowed the Revenue Requirements which were earlier adjusted against

the Delhi Vidyut Board arrears and wrongly considered to the account of the Appellant.

**15.** Thus, the grievance of the Appellant is that the ratio decided by this Tribunal in Appeals No.133 of 2007 and 28 of 2010 has not been followed by the State Commission merely on the ground that the Appeal had been filed by the State Commission before the Hon'ble Supreme Court and the same are pending.

**16.** The learned Counsel for the Appellant pointed out two important aspects:

(i) Even though the State Commission has filed the Appeal as against the judgment in Appeal No.133 of 2007 rendered by this Tribunal on 13.1.2009 in the Hon'ble Supreme Court, the State Commission has not chosen to file an Appeal as against the judgment in Appeal No.28 of 2008 rendered on 29.9.2010, which decided the same point in favour of the Appellant.

(ii) In Appeal filed against the judgment in Appeal No.133 of 2007 by this Tribunal, the Hon'ble Supreme Court did not grant stay.

**17.** On the basis of these aspects referred to above, the learned Counsel for the Appellant seeks for appropriate directions.

18. Taking note of above aspects, let us refer to the impugned order passed by the State Commission while refusing to implement the decision of this Tribunal on this point:

*“The State Commission has, inter-alia, held as under:*

***"Impact of Appeal No 133/2007***

***Stakeholder's Comment***

*2.14 The stakeholders have argued that pending the Appeal in Supreme Court against the Orders of the ATE in Appeal No. 133/2007, additional amounts allowed by the Hon'ble ATE in its Order should not be considered.*

***Petitioner's Submission***

*2.15 The Petitioner has submitted that since no stay has been granted by the Hon'ble Supreme Court the same should be allowed.*

***Commission's View***

*2.16 The Commission is of the view that the additional amount on the issues where appeal is pending before the Hon'ble Supreme Court shall be considered once the matter is decided by the Hon'ble Supreme Court."*

.....  
.....  
***DVB arrears***

***Petitioner's Submission***

*3.17 The Petitioner has submitted that it filed an appeal before the Hon'ble ATE against the Tariff Order dated September 22, 2006 for Bulk Supply of Electricity for FY 2006-07 (Appeal No. 133/2007) and against MYT Order (Appeal No.*

28/2008). The Petitioner requested the Hon'ble ATE to consider DVB arrears of Rs. 637 Cr on account of non receipt of the same from the Holding Company while determining the Bulk Supply Tariff for the Petitioner. The Hon'ble ATE vide Order dated 13.1.2009 in the Appeal No. 133 of 2007 has considered the issue and passed Order as under:

*"... the appeal succeeds and the Commission shall not treat the amount received by DPCL as amount coming to the credit of appellant..."*

*The affect of the judgment along with the carrying cost will have to be given to truing up and subsequent tariff orders".*

3.18 The Petitioner has submitted additional liability of Rs.637.66 Cr towards DVB arrears along with carrying cost @ 11.5% upto 31st March 2011 of Rs.408.79 Cr.

### **Commission's Analysis**

3.19 The Commission has filed a statutory appeal under section 125 of Electricity Act 2003, assailing the Hon'ble ATE Order dated January 13, 2009 in Appeal No 133/07. The matter is sub-judice and has not attained finality."

**19.** In the impugned order, the State Commission did not refer to the judgment in Appeal No.28 of 2010 which had not been challenged before the Hon'ble Supreme Court and as such it has attained finality.

**20.** As a matter of fact, when the Appellant filed the Appeal No.28 of 2010, the Appellant brought to notice of this

Tribunal that the ratio, on this point decided by this Tribunal on this issue in the earlier Appeal in Appeal No.133 of 2007 had not been followed by the State Commission on the ground that the Appeal was pending as against the judgment in Appeal No.133 of 2007 before the Hon'ble Supreme Court. This Tribunal while allowing the Appeal in Appeal No.28 of 2010 has specifically dealt with the said issue and rejected the contentions of the State Commission regarding the pendency of the Appeal before the Hon'ble Supreme Court in the absence of stay. The relevant portion of the observation of this Tribunal on this point is as follows:

*"18. It is contended by the Learned Counsel for the State Commission that this claim cannot be allowed in pursuance of the order dated 13.01.2009 of Tribunal since the State Commission has filed an Appeal against the said order and therefore it has not attained finality. In reply to the above submission, the Learned Counsel for the Appellant has submitted that while the Appeal has been filed by the State Commission before the Hon'ble Supreme Court, there was a considerable delay in filing the Appeal and therefore they filed an application for condonation of delay which has not been disposed of yet and further no stay has been granted by the Hon'ble Supreme Court and therefore, the State Commission ought to have followed the finding of the Tribunal. We are unable to accept the submission made by the Learned Counsel for the State Commission since mere pendency of the Appeal before the Hon'ble Supreme Court, would not entitle the State Commission to observe that they would not follow the order of the Tribunal merely because an Appeal has been filed. In this case, it is relevant to*

*refer to the Hon'ble Supreme Court's decision in the case of Shree Chamundi Mopeds Limited v. Church of South India Trust Association, Madras (1992) 3 SCC 1 wherein it was held that even a stay granted by the Hon'ble Supreme Court would not mean that the decision rendered by the Appellate Court would become non-est. Therefore, this point is allowed in favour of the Appellant."*

**21.** Even when this judgment rejecting the said contentions of the State Commission in Appeal No.28 of 2010 was brought to the notice of State Commission, unfortunately, the State Commission again refused to follow the judgment of this Tribunal in the impugned order dated 26.8.2011 indicating that the Appeal as against the judgment in Appeal No.133 of 2007 was pending before the Hon'ble Supreme Court without even referring to the other judgment in Appeal No.28 of 2010. In fact, the ratio decided on this issue has already attained finality in Appeal No.28 of 2010 as admittedly, no Appeal had been filed before the Hon'ble Supreme Court as against the said decision through the judgment dated 29.9.2010. Thus, this attitude on the part of the State Commission to ignore the decision taken by this Tribunal on this point, would show its audacity to challenge the majesty of this Tribunal by refusing to implement the same, which is most unfortunate.

**22.** It is settled law as laid down by the Hon'ble Supreme Court in its various decisions that mere pendency of an Appeal

can never be a ground for non implementation of the decision taken by this Tribunal in the absence of any stay by the Hon'ble Supreme Court. The State Commission being the subordinate authority, cannot violate the orders of this Tribunal and refuse to implement the same. It is neither sustainable in law nor appropriate for the State Commission to refuse to implement the decision rendered by this Tribunal on the ground that the decision has not achieved finality.

- 23.** In fact, as indicated above, the very same contention of the State Commission earlier urged, was rejected by this Tribunal in its decision in Appeal No.28 of 2008. So, the State Commission, in the absence of the stay in Appeal filed as against the Appeal No.133 of 2007 and in the absence of any Appeal being filed as against the Appeal No.28 of 2008, the State Commission ought not to have adopted this attitude by openly declaring through the impugned order that it would not implement the orders of this Tribunal which is nothing but sheer insubordination.
- 24.** During the hearing of this Appeal, the learned Counsel for the State Commission in its oral arguments has stated that the orders of this Tribunal were not implemented because the same will cause tariff shock to the consumers. Admittedly, this ground for non implementation of the judgment of this Tribunal was never referred to in the impugned order by the State Commission.

- 25.** The only reasoning given in the impugned order for non implementation is the pendency of the Civil Appeal before the Hon'ble Supreme Court. No other reasons have been given in the impugned order. If there was any difficulty in the implementation of the judgment of this Tribunal, the State Commission could have approached this Tribunal either for modifications or for review. This was not done. Instead, the State Commission passed the impugned order holding that they would not implement the order of this Tribunal. This is quite unfortunate.
- 26.** Strangely, the State Commission in its reply, while justifying their stand, has referred one of the earlier orders passed by this Tribunal dated 27.9.2010 in the Petition filed by the DTL for directing the State Commission for implementation of the judgment in Appeal No.133 of 2007, this Tribunal dismissed this by stating that since the order passed by this Tribunal had been challenged before the Hon'ble Supreme Court, the Tribunal did not incline to give any direction to implement the said judgment. The reliance of the State Commission on this order is misconceived. The order that was passed on 27.9.2010, cannot be considered to a license for the State Commission to hold that they would not implement the order of this Tribunal pending Appeal in the Hon'ble Supreme Court especially when the same is not a ratio. If the State Commission felt that the said order would support their

stand they should have approached this Tribunal to seek for similar directions. No such attempt was made by the State Commission. In fact, by the judgment dated 29.9.2010, we have specifically directed the State Commission to implement the directions already given in Appeal No.133 of 2010. Even then, they have not complied with the said directions thereby they deliberately disobeyed our order dated 29.9.2010 while passing the impugned order dated 26.8.2011 even without referring to the said directions given in Appeal No.28 of 2008.

- 27.** As indicated above, the State Commission ought to have implemented the directions given in our judgment subject to the outcome of the Appeal in Hon'ble Supreme Court in the absence of stay or they must have obtained the stay of the operation of our judgment giving directions to the State Commission in the Appeal pending before the Hon'ble Supreme Court. At least, they would have filed an application informing the practical difficulties for implementation of the said judgment in regard to those issues and sought for appropriate directions. Admittedly, this was not done. This shows the 'Don't care attitude' of the State Commission towards this Tribunal, the Appellate Authority. This is sorry state of affairs.

- 28.** As mentioned above, we can not now accept the reasons given by the State Commission in its oral arguments for non-implementation of the judgment.
- 29.** As pointed out by the learned Counsel for the Appellant, the State Commission, as a judicial authority has to be limited to the reasons mentioned in the impugned order alone and cannot rely upon the extraneous reasons which are not referred to in the impugned order. This position is a settled law as held by the Hon'ble Supreme Court in the case of Mohinder Singh Gill V. Chief Election Commissioner, (1978) 1 SCC 405.
- 30.** One more aspect has to be noticed in this context. The Respondent No.4, NDPL has filed a reply to the Appeal supporting the impugned order of the State Commission on this point by stating that the State Commission was justified in deferring the implementation of the order of this Tribunal.
- 31.** In the written submissions, the R-4 has raised a new ground in support of the impugned order stating that in terms of the policy directives issued by the Government of NCT of Delhi, the Distribution Licensee's tariff cannot be increased and the tariff has to be determined in terms of the capacity to pay of the distribution licensee and any additional burden is only to be borne by the Government and not included in the tariff.

**32.** This contention urged by the R-4 is untenable as this point has already been decided by this Tribunal in the Appeal filed by the R-4 itself in Appeal No.30 of 2010 i.e. North Delhi Power Limited & Others v. Delhi Electricity Regulatory Commission and Another reported in 2010 ELR APTEL 800. In the above case, the very precise question was raised by R-4 as to whether there is any “capacity to pay” principle provided for in the policy directive of the Government of NCT of Delhi which caps the tariff of the distribution licensee provides that the Appellant is not entitled to recover its revenue requirements from the tariff to be paid by the distribution licensee.

**33.** Rejecting the contentions of the R-4, this Tribunal has held as follows:

*“The claim of the Appellants is that the Distribution companies are not liable to pay the said additional amount and either the Delhi Government or the DTL (R-2) have to bear the amount in excess of Rs.3450 Crores. This contention is misconceived. The policy directions cannot be read as an agreement on the part of Delhi Government to provide transitory support without limit or an obligation on DTL (R-2) to absorb all the increase in the bulk supply tariff within itself without a right to pass it on to the distribution licensees. Therefore, the foundation on which the Appellants are basing their claims in the present case is fallacious”.*

**34.** In view of the above decision already rendered by this Tribunal, the very basis of the argument by the R-4 that it is

for the Government of Delhi to pay the amount claimed by the Appellant is misconceived.

- 35.** The very purpose of the creation of the Regulatory Commissions is to distance the Government from the tariff determination process and to ensure that the tariff is determined on a viable basis to recover the cost of expenditure of the licensees. In other words, the Government has no obligation to pay any amount, except for the amounts expressly admitted and agreed to be paid by the Government for a particular purpose.
- 36.** In any event, the fastening of the DVB collected to the account of the Appellant is as much as uncontrollable factor to the Appellant as the power purchase cost. Therefore, there is no merit whatsoever in the submissions made by the R-4.
- 37.** In this case, as indicated above, the State Commission has ventured to decide not to follow the dictum laid down by this Tribunal which would show the attitude of the State Commission to violate the judicial discipline to be maintained by the subordinate authorities.
- 38.** It is well settled law that the characteristic attribute of the judicial act or a decision of the Appellate Authority would bind the subordinate authorities whether it be right or wrong. In other words, the alleged error of law or error of fact

committed by the Appellate Judicial body can not be impeached by the subordinate authority except by the judgment in the Appeal by the Appellate Forum.

39. The principle of judicial discipline requires that the orders of the Appellate authorities should be followed scrupulously by its subordinate authorities. If the Subordinate authority refuses to carry out the directions or to follow the dictums given by the superior Tribunal in exercise of Appellate powers, the result would be chaos in the administration of the justice. In fact, it will be destructive of one of the basic principles of the administration of justice.
40. If the State Commission develops such a mindset that they cannot be questioned by the Appellate Authority at any cost, then there would be serious havoc.
41. As a quasi judicial authority, the State Commission is expected to know the law prescribed under the Act and the legal procedures laid down by this Tribunal and Hon'ble Supreme Court.
42. In this case, with great restraint, we are constrained to observe the conduct of the State Commission who has not cared to follow our directions, would reflect lack of judicial approach, lack of judicial knowledge and lack of judicial ethics. We do not want to say more than this.

43. In view of the above, the impugned order is set aside on this point with the directions to the State Commission to comply with the directions without fail as given in Appeal No.133 of 2007 in which no stay has been granted by the Hon'ble Supreme Court and the directions given in Appeal No.28 of 2008 against which no Appeal has been filed.
44. If the directions given in this judgment are not followed by the State Commission in the future, then this Tribunal would be constrained to take suitable action by resorting to imposition of exemplary cost on the State Commission as well as by resorting to other penal provisions like Section 146 etc. Thus, this issue is decided accordingly.
45. The **Second Issue** relates to Assumption of the sum of Rs.196.17 Crores as surplus to the Appellant, contrary to the decision of this Tribunal.
46. According to the Appellant, the State Commission has grossly erred in assuming the surplus to the account of the Appellant even though this Tribunal gave a specific finding in the earlier Appeal that there is a huge deficit for the Appellant.
47. Let us now refer to the impugned order in which this point has been decided. These observations are as follows:

**"3.38** *In the MYT Order for the Petitioner, the Commission had carried out true-up for FY 2006-07 and had approved a total surplus of Rs 196.17 Cr. The same was to be adjusted towards the ARR of the distribution licensees. The Petitioner has submitted that no payment has been made so far to the distribution licensees on this account.*

**3.39** *The Commission has, therefore, adjusted the surplus amount (Rs 196.17 Cr along with negative carrying cost@11.5%) against the amount receivable by the Petitioner due to revision of costs pertaining to the Policy Direction Period as discussed in the previous sections. The same is shown in Table 12."*

**48.** As pointed out by the learned Counsel for the Appellant in the earlier Appeal in Appeal No.30 of 2010, this point was dealt with by this Tribunal holding that the surplus amount of Rs.196.17 Crores was not available to the Appellant. The relevant portion of the findings by this Tribunal in the judgment in Appeal No.30 of 2010 dated 31.5.2010 filed by the Distribution Licensees is as follows:

**"47.** *The Learned Counsel for the Appellant during the hearing has stated that the surplus amount of Rs. 196.17 crores payable by the DTL (R-2) to the distribution companies/Appellant as per MYT order dated 20.12.2007 remains unimplemented for over 26 months till date nor given effect in the two subsequent tariff orders passed by the State Commission on 23.02.2008 and 29.05.2009. On the other hand, it is pointed out by the Learned Counsel for the Respondent that true up order dated 20.12.2007 shows a net deficit in the revenue requirement approved for the year 2005-06 and that the surplus of*

*Rs. 196.17 crores shown in the subsequent order for 2006-07 was expressly made subject to result of Appeal No. 133 of 2007 (AFR 372 of 2007) which was then pending before the Tribunal. This has been stated in the truing up order dated 20.12.2007 as under:*

*“The Commission having deliberated upon the Multi Year Tariff Petition filed for the Control Period of FY 2008-11, along with the Business Plan for the said Control Period and also the subsequent filing by the Petitioner during the course of the proceedings and having considered the responses received from stakeholders, in exercise of the power vested under the Delhi Electricity Regulatory Commission (Terms and Conditions for Determination of Transmission Tariff) Regulations, 2007 read with the provisions of Electricity Act, 2003 hereby pass this Order signed, dated and issued on 20<sup>th</sup> day of December, 2007.*

*The Petitioner shall take immediate steps to implement the said Order, so as to make the revised tariffs applicable from 1<sup>st</sup> January, 2008.*

*This Order may be amended reviewed or modified in accordance with the provisions of the Electricity Act,2003 and the Regulations made there under.*

*This Order shall be subject to the final outcome of AFR No. 372/2007 before the Appellate Tribunal for Electricity.”*

**48.** *This Appeal has been finally disposed of on 29.05.2009 in favour of the DTL (R-2) resulting in substantial amount to be paid to the DTL (R-2), over Rs. 429 crores as against the earlier amount of Rs. 196.17 crores. By virtue of the above decision, there is*

*a huge deficit which needs to be recovered by the DTL (R-2) from the distribution licensees. Thus, the finding of the surplus amount of Rs. 196.17 crores earlier made by the State Commission is of no effect since the order of Tribunal subsequently passed modifying the same. Therefore, this contention urged by the Appellant also would fail”.*

- 49.** Despite the findings of this Tribunal that there is a huge deficit for the Appellant as against the surplus determined by the State Commission, there can be no question of the State Commission seeking to pass on the purported surplus of Rs.196.17 Crores from the Appellant to the distribution licensees.
- 50.** Therefore, it has to be held that the State Commission was not proper in assuming the surplus to the account of the Appellant. So, this point is also decided in favour of the Appellant.
- 51.** The **Third Issue** relates to Escalation for the Multi Year Period based on Actual Data.
- 52.** On this issue, this Tribunal in the other Appeals filed by one of the distribution licensees while interpreting the Regulations of the State Commission, held that every year adjustment of the Indexation factor is not required and it is only for the five years immediately preceding the coming into force of the Regulations.

53. In view of the above, the Appellant does not press the issue for adjudication. Therefore, we do not propose to deal with this issue.

54. The **Fourth Issue** is Non allowance of late payment surcharge.

55. According to the Appellant, the Appellant was not in a position to fully discharge its power purchase cost during the period prior to 1.4.2007 since the State Commission had not allowed the full power purchase cost in the tariff year which has only been subsequently allowed in the truing up process due to which the Appellant had to suffer severe cash flow problems which resulted in late payments of surcharge. The Appellant has claimed that the late payment surcharge on the additional power purchase liability at the rate of Rs.1.25% per month payable by it should also be allowed as a pass through in tariff. However, the State Commission had held that the late payment surcharge is penal interest which cannot be allowed. The relevant portion of the findings in the impugned order is as follows:

*"(d) The Petitioner has paid Rs 18.19 lacs as LPSC to NHPC in FY 2009-10. Since no penal interest can be allowed to be claimed in the ARR, the Commission has disallowed this amount and has deducted the same from the total power purchase cost for FY 2009-10.*

.....

**3.14** *The Petitioner has also requested for surcharge on the additional power purchase liability @1.25% per month. The Commission is of the view that no penal interest can be allowed to be claimed in the ARR as the Petitioner is required to pay bill on time and the Petitioner shall only be eligible for carrying cost @11.50% per annum on the amount."*

**3.36.** *The Commission is of the view that in case the LPSC claimed by the Petitioner from the Distribution licensees for the period December 2009-March, 2011 is higher than that of the carrying cost allowed to the distribution licensees for the same period, the latter must bear the difference and it shall not be allowed in the ARR of the distribution licensees. The Commission considers this to be appropriate as the difference between the two amounts is in the nature of penal interest which must be borne by the distribution licensees themselves and should not be passed on to the consumer."*

**56.** The above observations would reveal that the State Commission has taken a view that the late payment surcharge claimed by the Appellant is higher than the carrying cost allowed to the distribution licensee for the said period, the distribution licensee must bear the difference and it shall not be allowed in the ARR of the Distribution Licensee.

**57.** The above view has been taken by the State Commission on the ground that the difference between the two amounts which is in the nature of penal interest should not be passed on to the consumers. Therefore, we conclude that there is

no infirmity in the finding of the State Commission on this issue. This point is decided as against the Appellant.

- 58.** The **Next Issue** is disallowance of rebate on timely payment allowed by the Appellant to Distribution Licensee.
- 59.** According to the Appellant, the Appellant is required to allow the rebate to the distribution licensee for prompt payment of the bills to the Appellant and since the Appellant was short of such payments, the Appellant claimed such rebate to be allowed in its revenue requirements.
- 60.** It is stated by the Appellant that the State Commission had disallowed on wrong reasons by holding that the rebate is a commercial arrangement between the Appellant and the Distribution Licensee and so the same cannot be allowed. The relevant portion of the findings in the impugned order is as follows:

***“Commission’s Analysis***

***“3.155 Regarding the Rebate on Transmission/Wheeling of Power the Commission had clarified its position in the MYT order and stated that:***

*“The Commission acknowledges the rebate given to DISCOMS is a commercial arrangement, and cannot be passed through in tariffs. Hence, no rebate has been allowed for the Control Period.”*

***3.156 Thus no rebate has been allowed in the ARR for FY 2011-12 as well.”***

61. The above findings would indicate that the State Commission has acknowledged the rebate in pursuance of the arrangements between the Appellant and the Distribution Licensee and as such, it is a commercial arrangement and no rebate has been allowed in the control period in the MYT order.
62. We notice that the Working Capital requirement for the Appellant is calculated by the Commission on normative basis in accordance with the MYT Regulations, 2007 including receivables for two months towards transmission tariff. Thus, if the Appellant allows rebate of 2% on payment through LC on presentation and 1% on payment within one month to the distribution licensee in the commercial arrangement, the same could not be again passed on to the distribution licensees or the consumers in the form of transmission tariff.
63. Thus, we do not find any infirmity in the order of the State Commission regarding rebate given to the distribution licensees.
64. The **Last Issue** is the implementation of the 6<sup>th</sup> Pay Commission's recommendations.
65. According to the Appellant, the Appellant has already implemented the 6<sup>th</sup> Pay Commission's recommendations and consequent to such pay revisions, the actual cost has

increased since the year 2007 and on that basis, the Appellant had claimed a sum of Rs.34.34 Crores for the year 2010-11 but the State Commission has restricted the same only to Rs.31.21 Crores.

**66.** According to the State Commission, as per the MYT Regulations, 2007 for determination of employee expenses are allowable to the licensee only on the normative basis and the same has been determined in this case by using proper methodology.

**67.** On going through the impugned order, it is clear that the State Commission had acknowledged and accepted the revision in the employee's cost as uncontrollable. The order dated 20.12.2007 of the State Commission determining the Revenue Requirements for the Multi Year period 2007-08 to 2010-11 reads as under:

***“4.26** The Commission has recognized the uncontrollable nature of the 6<sup>th</sup> Pay Commission recommendations in determination of employee expenses during the Control Period. Since the revision in pay, if any, may be applicable from January 1, 2006, the Commission has considered an increase of 10% in total employee expenses for the values in FY 06 (3 months) and FY 07 due to the same.*

***4.27** Based on this, the Commission has calculated the revised employee cost for FY 06 and FY 07 and the arrears arising out of it”.*

68. As pointed out by the learned Counsel for the Appellant at the time of passing the above order dated 20.12.2007, the actual details of the impact of the 6<sup>th</sup> pay Commission recommendations was not available and under those circumstances, the State Commission permitted an ad-hoc increase of 10% in the employees cost.

69. In the present case, it is pointed out that the actual data has been made available to the State Commission. Therefore, the State Commission should have allowed the impact of 6<sup>th</sup> Pay Commission's recommendations on actual basis and not restricted the employee's cost by applying an indexation factor from the year 2007-08. Accordingly, this point is answered in favour of the Appellant.

**70. Summary of Our Findings**

(a) **Implementation of the judgment of the Tribunal in Appeal Nos. 133 of 2007 and 28 of 2008:**  
The impugned order is set aside on this point with the directions to the State Commission to comply with the directions without fail as given in Appeal No.133 of 2007 in which no stay has been granted by the Hon'ble Supreme Court and the directions given in Appeal No.28 of 2008 against which no Appeal has been filed.

(b) **Assumption of a sum of Rs.196.17 Crores as surplus to the Appellant:** The State Commission was not correct in assuming the surplus of Rs.196.17 Crores to the account of the Appellant. This point is also decided in favour of the Appellant.

(c) **Escalation for the Multi Year Period based on actual data:** The Appellant has not pressed this issue in view of the earlier decision of the Tribunal on this issue in other Appeals filed by the distribution licensees as against the Appellant.

(d) **Non Allowance of late payment surcharge:** There is no infirmity in the order of the State Commission not allowing the penal interest in the APR.

(e) **Disallowance of rebate for timely payment allowed by the Appellant to Distribution licensees:** We do not find any infirmity in the order of the State Commission in not permitting the amount of rebate for timely payment allowed by the Appellant to the Distribution Licensees in the tariff of the Appellant.

(f) **Implementation of 6<sup>th</sup> Pay Commission's Recommendations:** The State Commission should have allowed the impact of 6<sup>th</sup> pay Commission's

**recommendations on actual basis. This point is answered in favour of the Appellant.**

**71.** In view of above findings, the Appeal is partly allowed to the extent indicated above. However, there is no order as to costs.

**72.** Pronounced in the Open Court on 27th day of February, 2013.

***(Rakesh Nath)***  
***Technical Member***

***(Justice M. Karpaga Vinayagam)***  
***Chairperson***

Dated:27<sup>th</sup> Feb, 2013

✓ ~~REPORTABLE/NON-REPORTABLE~~